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COMMISSION ON HUMAN RIGHTS
Fifty-seventh session
Item 10 of the provisional agenda

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights

Report of the High Commissioner for Human Rights

Addendum

Introduction

1. In paragraph 7(b) of its resolution 2000/9, the Commission on Human Rights requested the High Commissioner to invite all States, intergovernmental organizations and non-governmental organizations which have not yet done so to submit their comments on the report by the Committee on Economic, Social and Cultural Rights on a draft optional protocol for the consideration of communications in relation to the Covenant (E/CN.4/1997/105, annex), as well as to invite all States to submit their comments on the options relating to the proposal for a draft optional protocol, contained in the report of the High Commissioner for Human Rights on the draft optional protocol to the Covenant (E/CN.4/2000/49), or to propose any other option that would be conducive to a substantive dialogue, giving due regard to the respective roles of the Committee and the Sub-Commission on the Promotion and Protection of Human Rights.

2. Comments received until 15 November 2000 are contained in document E/CN.4/2001/62. Additional information received, as at 15 February 2001, from Chile and Sweden, is contained in the present document. The substantive parts of the replies received is provided. The full text of the replies may be consulted in the files of the secretariat.

COMMENTS FROM STATES

Chile

[Original: Spanish
8 January 2001]

The Minister for Foreign Affairs of the Republic of Chile states that, in his opinion, the resolution approved without a vote last April (2000) contains nothing that would be controversial for the Government of Chile and that, on the contrary, he thinks its implementation should be strongly supported. He also points out that the resolution contains a decision, namely, to reiterate a request to the United Nations High Commissioner for Human Rights to organize in 2001 a workshop to identify progressive developmental benchmarks and indicators related to the right to education.

Sweden

[Original: English
22 November 2000]

1. Regarding comments on the report by the Committee on Economic, Social and Cultural Rights on a draft optional protocol in relation to the Covenant, reference is made to the Swedish comments submitted on 21 December 1998 and contained in document E/CN.4/1999/112/Add.1.

2. The Government of Sweden attributes great importance to the role of the Committee in the follow-up of the implementation of the International Covenant on Economic, Social and Cultural Rights. Sweden therefore lends its support to efforts aimed at improving the effectiveness and relevance of the Committee's work.

3. The Government of Sweden remains unconvinced, however, that the suggested draft optional protocol presents an optimal way forward in strengthening the international mechanisms needed to contribute to the universal realization of economic, social and cultural rights.

4. Sweden notes that only a limited number of States have responded to the repeated requests by the Commission on Human Rights to all States, intergovernmental organizations and non-governmental organizations to submit their comments on a draft optional protocol to the relevant Covenant. Sweden believes that the present number of comments provides an insufficient basis to determine any further steps as regards the suggested optional protocol.

5. Sweden would like to suggest that the Committee on Economic, Social and Cultural Rights further explore the question of best ways of implementing economic, social and cultural rights, taking fully into account its existing mandate as established in the implementing articles of the Covenant. The Committee has a unique role to play in linking internationally recognized norms on human rights to the work of the United Nations agencies and bodies in the economic, social and cultural fields.

6. Ultimately, what should determine whether an approach taken is valid and reasonable is whether it is likely to provide the best way forward in bringing about change in the real life of individuals seeking the enjoyment of their economic, social and cultural rights. Today we are encouraged by the efforts of the Secretary-General to integrate human rights into the whole United Nations. It is the opinion of Sweden that the Committee on Economic, Social and Cultural Rights should play a key role in this process, which in fact is already under way within a number of United Nations agencies and bodies. Sweden believes that the Committee has yet to develop its full potential within the framework of its existing mandate in assisting Governments in fulfilling their obligations relating to the realization of economic, social and cultural rights.

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COMMISSION ON HUMAN RIGHTS
Fifty-seventh session
Agenda item 10

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Report of the High Commissioner for Human Rights

Addendum

Report on the workshop on the justiciability of economic, social and cultural rights, with particular reference to the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights

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I. INTRODUCTION

1. Pursuant to paragraph 7 (b) and (f) of Commission on Human Rights resolution 2000/9 the Office of the High Commissioner for Human Rights organized a workshop on the justiciability of economic, social and cultural rights, with particular reference to the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights in Geneva, on 5 and 6 February 2001. The workshop was organized in cooperation with the International Commission of Jurists (ICJ) and with the financial support of the Government of Finland.

2. The objective of the workshop was to discuss the issue of justiciability of economic, social and cultural rights, in particular in the framework of a draft optional protocol providing for an individual complaints procedure for these rights as drafted by the United Nations Committee on Economic, Social and Cultural Rights and submitted to the Commission on Human Rights in December 1996 (E/CN.4/1997/105, annex). During the two-day workshop representatives of 74 Governments, 6 United Nations agencies and international organizations and 18 non-governmental organizations (NGOs) actively participated in interactive plenary discussions that followed expert presentations and panel discussions.

II. OPENING OF THE WORKSHOP

3. The High Commissioner for Human Rights opened the workshop on the morning of 5 February 2001. She stressed the important catalytic role that the workshop could play in efforts to restore the symmetry that the architects of the international human rights framework intended, in light of the principle of the interdependence and indivisibility of all human rights: civil, cultural, economic, political and social. She recalled the recent adoption of the optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Finally, she expressed the hope that the workshop, which brought together in a single forum Member States, experts, NGOs and practitioners, would help to clarify the issues at stake, in a manner that was satisfactory to the member States of the Commission on Human Rights and that would help the Commission to move forward in its vital work on the question of the draft optional protocol.

4. Ambassador Pekka Huhtaniemi of Finland, co-Chairperson of the morning session on 5 February 2001, expressed the commitment of the Government of Finland to contributing to the further development of the United Nations human rights system, which he considered as a continuous process of seeking new and better solutions. Finland's support for this workshop, in financial and other forms, was to be seen as an example of this commitment. He conveyed his Government's support for an optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR). Finland's position was that economic, social and cultural rights were indeed justiciable. This was supported by Finland's own experience in constitutional reform. The ambassador also emphasized the principle of interdependence and indivisibility of all human rights, which demanded that equal importance and equal treatment be given to all human rights. In conclusion, he expressed the hope that the discussions during the workshop, as a forum for critical dialogue, would contribute positively to the further promotion and protection of human rights.

5. Mr. Dalmo de Abreu Dallari, Vice-President of the International Commission of Jurists (ICJ), expressed his gratitude to OHCHR and the Government of Finland for their willingness to join forces with the ICJ in efforts to improve the economic and social conditions of people all over the world. He brought to the attention of the workshop participants the long-standing commitment of the ICJ to enhancing the promotion and protection of economic, social and cultural rights, on a par with the promotion and protection of civil and political rights. The activities of ICJ with regard to economic, social and cultural rights had been undertaken in the framework of the United Nations, the Council of Europe and, in particular, the European Social Charter and the 1995 Additional Protocol providing for a system of collective complaints. Professor Dallari highlighted other regional developments concerning the protection of economic, social and cultural rights, such as the entry into force of the San Salvador Protocol in the Inter-American system - providing a system of complaints with regard to certain economic and social rights - and the possibility to submit communications on economic and social rights under the African Charter on Human and Peoples' Rights. He concluded by stating that with the present workshop, the opportunity had arrived to move beyond the ideological debates of the previous century and to discuss in an unconstrained, frank and objective manner the justiciability of economic, social and cultural rights and the draft optional protocol to the Covenant, thereby finally doing justice to the principle of the indivisibility and interdependence of all human rights.

III. JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: NATIONAL EXPERIENCES

6. Mr. Ariranga Pillay, Chief Justice of the Supreme Court of Mauritius and member of the Committee on Economic, Social and Cultural Rights, spoke on the justiciability of economic, social and cultural rights: national experiences. On the basis of the work that the Committee had undertaken to assist States parties in the implementation of their obligations under the Covenant, such as the general comments of the Committee, Mr. Pillay expounded on the ways that States, as well as adjudicators, might better comprehend the precise contours of Covenant rights and obligations. This would help to arrive at better implementation by States and by national judiciaries. He spoke of the need to ensure that the Covenant and its provisions were self-executing at the national level, especially in legal systems requiring the transformation of international law into national law. He also reviewed the types of obligations that States parties had under the Covenant (i.e. obligations to respect, to protect and to fulfil), and noted that some were subject to immediate application in full, such as non-discrimination. In concluding, he stated that Covenant rights were in many respects described with sufficient precision and clarity as to be justiciable, while, as was the case with civil and political rights, there were other elements which needed to be spelled out in more detail in national legislation, and tailored to the specific national context, needs and resources.

7. Mr. Alberto-León Gómez-Zuluaga, advocate and former assistant director of the economic, social and cultural rights programme of the Colombian Commission of Jurists, spoke of two specific possibilities in Colombian law to secure the justiciability of economic, social and cultural rights. First, there was the amparo measure, allowing for any court to directly ensure rights guaranteed in the Constitution and invoke international law (article 93 of the Constitution establishing the supremacy of international law over national law). The second was in a national court of law through an action erga omnes, on the grounds of non-constitutionality. Human rights had been included in national legislation, and legislation that was not in conformity with

international human rights norms could be challenged under the Constitution. Finally, he emphasized the need for the international community to continue its efforts to move towards the adoption of an optional protocol to the ICESCR, given the impact that international doctrine and jurisprudence had on national interpretation, and as this would ensure a continuing dialogue with national courts to guarantee the full respect of rights.

8. Ms. Sandra Liebenberg, associate professor and acting director of the Community Law Centre of the University of the Western Cape, informed the workshop of relevant developments in South Africa. The 1996 Constitution of South Africa, for historical reasons, encompassed a wide range of economic, social and cultural rights, on an equal footing with civil and political rights. Despite the fact that South Africa had signed but not yet ratified the International Covenant on Economic, Social and Cultural Rights, the South African courts were increasingly creating a foundation of jurisprudence, moving towards improved protection of human rights. One notable example was the Grootboom case, concerning the forced eviction of squatters, which was a landmark decision establishing a number of important principles: the first was that the justiciability of economic, social and cultural rights could not be determined in abstract. Secondly, the case confirmed the interdependence and interrelatedness of all rights (Grootboom, para. 23: "There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [Bill of Rights]"). Thirdly, the court developed the so-called "reasonableness" standard with regard to socio-economic rights, in order to determine whether the State was complying with its obligations under the Constitution, and cited with approval the interpretation of the Committee on Economic, Social and Cultural Rights regarding the obligation of progressive implementation (article 2 (1) of the ICESCR), as set forth in its General Comment No. 3. A housing policy could, therefore, be subjected to the reasonableness standard, thereby taking into consideration housing problems in their social, economic and historical context and the capacity of institutions responsible for implementing the programme. She concluded by stating that the Grootboom case sought to strike an appropriate balance between the constitutional responsibility of the courts to enforce the duties imposed by socio-economic rights, and the role of the legislature and the executive in a democracy to make and implement laws and policies, thereby fostering a relationship of accountability, transparency and responsiveness between judiciary, legislature and executive.

9. Mr. Bruce Porter, coordinator of the Charter Committee on Poverty Issues (Canada), spoke of the Canadian experience with regard to the justiciability of economic, social and cultural rights, particularly focusing on three main points: first, that even in a country without explicit domestic legal recognition of social and economic rights, and one in which there remained considerable caution about excessive judicial interference with legislatures and parliament, there was a solid foundation on which social and economic rights could be claimed and adjudicated. Secondly, there was no validity to the suggestion that declaring social and economic rights non-justiciable was a helpful way to limit inappropriate judicial interference with the policy-making function of legislatures. Thirdly, it would be incorrect to think that social and economic rights were not pressing issues in affluent countries, or that affluent countries would not be found to violate social and economic rights when they were properly adjudicated. He stressed that the relationship between courts and legislatures should not be approached as a power struggle between them, but rather as an attempt to find a proper

framework for constructive interaction involving the rights claimant, the court and the respondent. Adjudicating social and economic rights must thus be seen as an enhancement of participatory democracy. In conclusion, he expressed the need for national courts and human rights institutions to defend the fundamental values of human rights which Canada, in the past, had promoted, and the Canadian Supreme Court had laid the jurisprudential foundation for taking up that challenge. That process would be given considerable impetus if the international community were to send a stronger message to courts and tribunals in Canada and around the world that social and economic rights claims could and must be heard and adjudicated, i.e. by the adoption of an optional protocol to the ICESCR.

10. With regard to the French experience, Mr. Philippe Texier, judge at the French Cour de cassation and member of the Committee on Economic, Social and Cultural Rights, stated that although the Covenant was not incorporated in French national legislation, the judiciary applied legislation that was mostly in conformity with ICESCR provisions. As a judge in the Social Chamber of the Cour de cassation, his role consisted primarily of the daily determination of the justiciability of economic, social and cultural rights, and an abundance of jurisprudence existed on, inter alia, the right to equal work and equal pay (discrimination on the basis of gender, origin, etc.), trade union rights, health at work and collective bargaining agreements. As to the adoption of an optional protocol, he did not believe that obstacles of a fundamental nature existed. In light of the 1993 Vienna Declaration and Programme of Action - calling for the development of an optional protocol - and the work done by the Committee on the topic, as contained in the document submitted to the Commission on Human Rights in 1996, Mr. Texier considered it appropriate for the Commission on Human Rights to establish a working group to study the issue of the draft optional protocol at its earliest convenience.

11. Mr. Rajagopalan Venkataramani elaborated on the Indian experience in adjudication of economic and social rights, and pointed out the leading role of Indian courts, and in particular the Supreme Court, in interpreting these rights, thereby incorporating and transferring some of the rights in the International Covenant on Economic, Social and Cultural Rights into domestic law without the necessity of incorporation legislation. He referred to the use of relevant constitutional provisions, such as article 32 - which established the right to appeal to the Supreme Court as a guaranteed constitutional right in itself. The Supreme Court was thus in a special position to translate economic and social rights and to call upon the States to implement those rights. He described as well article 226 of the Constitution, which gave powers of judicial review to High Courts in the various States. He also mentioned a change of attitude in the 1950s by the Supreme Court, progressively deeming fundamental rights contained in the Constitution justiciable through the requirement that all State action was to conform to requirements of justice and reasonableness. Therefore, he argued, an optional protocol to the International Covenant on Economic, Social and Cultural Rights would not serve to establish justiciability (since this was already well established), but to enhance and to expand the existing development of jurisprudence on economic, social and cultural rights.

12. During the plenary discussion that followed the panel on national experiences, it was brought forward that all the presentations demonstrated common elements - such as the reasonableness requirement - that could be useful at both the national and international levels. At the same time, progress at the international level - such as the formulation of general comments - could feed into national efforts to delimit more precisely the boundaries of various

rights under the Covenant. Another point raised was that various institutions and organizations (FAO, WHO, Habitat International Coalition) had been working on the establishment of databases of relevant national case law concerning specific rights in specific countries, and that there was a need for more such databases. Information to set up databases was available, e.g. in the context of the Council of Europe where there was an abundance of information on more than 40 European countries. Mention was also made of progressive attitudes in the western hemisphere and in the context of the Organization of American States concerning the binding character of and the need to implement international decisions of the Inter-American Commission and Court on Human Rights. Some considered that the draft optional protocol to the Covenant should be amended to address more expressly the international dimensions and the international socio-economic context that could bear upon the case concerned. Others wondered whether the fact that core elements of many economic, social and cultural rights had not yet been sufficiently defined at both the national and international levels might pose problems of interpretation in the framework of the international complaints procedure provided by an optional protocol. Questions were raised about the extent to which the body might impinge upon the discretion of a State in deciding how to implement certain rights. In response to those issues of concern, it was brought forward that despite the importance of inter-State and international relations issues, it might not be appropriate to try and include them in the discussion on an international quasi-judicial communications procedure which aimed to regulate the situation between the State and the individual within the regime of an international human rights treaty. Moreover, it was replied that the adoption of an optional protocol would not establish justiciability a priori, but would allow the determination of whether a right was justiciable or not in each concrete case. Finally, it was emphasized that there were many ways to ensure the enjoyment of economic, social and cultural rights, and that both courts and treaty bodies tended to defer largely to States on how to implement rights.

IV. JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: INTERNATIONAL EXPERIENCES

13. Mr. Jean-François Akandji-Kombé, professor at the University of Caen Basse-Normandie (France), elaborated on the progress made on the protection of social rights in the European system, highlighting the adoption of the 1995 Additional Protocol to the European Social Charter, providing for a system of collective complaints on a selection of economic and social rights, thereby confirming the justiciability of economic and social rights as a common European heritage. He presented as among the most important points in European jurisprudence the development of the positive obligations of States, and the emphasis of the social dimension alongside more traditional human rights and freedoms. In conclusion, he pointed out that the discussion on justiciability should change perspective, as the principle of justiciability had been long established at the national, regional and international levels. The primary question of concern to the workshop pertained to the modalities of justiciability, which was not a legal question, but ultimately a political one.

14. Ms. Viviana Krsticevic, executive director of the Center for Justice and International Law, gave an overview of the Inter-American system with regard to the protection of economic and social rights, with particular focus on the San Salvador Protocol which entered into force in 2000 and which provided for three types of supervisory procedures: periodic reporting, the submission of individual complaints to the Inter-American Commission and the Inter-American

Court on Human Rights, and the formulation of recommendations by the Commission. This Protocol aims to guarantee rights with regard to, inter alia, trade unions and associations and the right to education. So far, the greatest results had been achieved with respect to the right to education, but the lessons learned can be applied, mutatis mutandis, to other economic and social rights. She concluded therefore that the Inter-American system demonstrated that there could be protection of economic, social and cultural rights at the international and regional levels through individual complaints.

15. On the experiences of the African Commission on Human and Peoples' Rights, Ms. Jainaba Johm, member of the African Commission, spoke of the great potential of the African Charter to protect economic and social rights, as the Charter allowed for complaints by individuals, groups and organizations, and States concerning the alleged violation of a wide range of human rights. So far, cases concerning economic and social rights which the African Commission had adjudicated had been brought forward in conjunction with civil and political rights, which confirmed the interdependence and indivisibility of all human rights in the African human rights protection framework.

16. Ms. Jane Connors, Chief of the United Nations Women's Unit, spoke on the drafting process and the structure of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, providing for a system of individual complaints and an inquiry procedure, which entered into force 22 December 2000. One remarkable aspect of the Optional Protocol was that it allowed for the submission of complaints on all rights contained in the Convention, including economic, social and cultural rights. The issue of justiciability was debated only in the beginning of discussions of the draft by Governments and ultimately became a non-issue, with Governments concluding that the supervisory body should be given the discretion to decide on justiciability, as with national courts. The progress made with regard to the Optional Protocol showed that questions of justiciability were not insurmountable obstacles to a draft optional protocol to the ICESCR. Relevant issues that deserved particular attention in the discussion were, inter alia, the notion of equality and non-discrimination, and the implications of the exhaustion of domestic remedies.

17. On the experiences of the Human Rights Committee, the supervisory body of the ICESCR's sibling instrument, the International Covenant on Civil and Political Rights (ICCPR), Mr. Vojin Dimitrijevic, director of the Belgrade Centre for Human Rights, pointed out that the ICCPR also contained provisions that were to be implemented gradually, and that they could be instructive in matters concerning economic, social and cultural rights (e.g. on discrimination in social security systems, in Zwaan-De Vries v. the Netherlands and Broeks v. the Netherlands).

18. In the ensuing discussion, questions were raised again about how the international dimension, and in particular how international cooperation obligations, as referred to in articles 2 (1), 22 and 23 of the ICESCR, could be addressed under the optional protocol to the ICESCR, e.g. Could this optional protocol include an inter-State complaints procedure? Would the right to development be subjected to the regime of an optional protocol to the ICESCR? It was stated that inter-State complaints procedures were generally not availed of, given the political sensitivities that they might engender. In addition, a cautious stance was called for with regard to including rights outside the Covenant such as the right to development, the content and operationalization of which were still being debated by the open-ended Working Group on the

Right to Development of the Commission on Human Rights. It was also pointed out that an optional protocol to the ICESCR might contribute favourably to the clarification of existing dilemmas of international dimensions, such as conflicting international obligations of one State (e.g. international trade obligations on one side and international human rights obligations on the other).

V. PRESENTATION OF THE DRAFT OPTIONAL PROTOCOL

19. In presenting the draft optional protocol to the ICESCR, as submitted to the Commission on Human Rights in 1996 (E/CN.4/1997/105, annex), Professor Philip Alston of the European University Institute in Florence, saw clear indications of the need to give a renewed emphasis to economic, social and cultural rights - the rights most historically neglected and now suffering most from the new orthodoxy of liberalization, markets and globalization. Even if one accepted the premise that the proposal was radical when it was endorsed by the World Conference on Human Rights in 1993, it could not still be seen as radical today and there could be no justification for the fierce resistance to the draft optional protocol. To support his claim, he noted similar mechanisms, which, since 1993, had been open to receiving complaints of denials of these rights. Among them were the Additional Protocol to the European Social Charter, the San Salvador Protocol, the ILO mechanisms, those of UNESCO, even the 1503 procedure and, most recently, the optional protocol to Convention on the Elimination of All Forms of Discrimination against Women. Why would certain States obstruct the adoption of a protocol which is, after all, optional? Mr. Alston believed that the optional protocol had wrongly been declared a "protocol non grata" by some States which sought even to block other States from having the instrument because they in fact opposed the very notion of economic, social and cultural rights as rights.

20. Mr. Alston added that some countries had raised real, understandable concerns and questions, worthy of careful review and honest discussion. If changes were needed to the draft, a serious and sustained working group discussion should make them. The experience of the optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women was instructive here, he noted, as sincere questions about justiciability were asked, explored, and then settled early in the process, such that the participating States became convinced that the justiciability question was no barrier. Mr. Alston suggested that the best strategy for progress on the draft might be the encouragement of a serious and sustained NGO campaign to build domestic constituencies to demand that their Governments support the optional protocol at the international level. Now was time to move to a process that would allow Governments to look at the real problems and to address them.

21. During the discussion on Mr. Alston's presentation, a number of concerns with regard to the operationalization of an optional protocol to the ICESCR were raised by participants. First, concern was expressed with respect to the capacity of the Committee on Economic, Social and Cultural Rights, which would need strengthening if it were to be responsible for adjudicating on matters that could have considerable impact on a State's socio-economic policy and concomitant expenditures. Secondly, questions were raised as to the type of cases that would be brought before the Committee and whether the present state of interpretation of Covenant rights would be a sufficient basis for the Committee to address a wide range of cases. The call for more

precision in the interpretations of the rights was also reiterated. Finally, the question was raised whether it would be possible to address the wider international context when the Committee considered the merits of a complaint.

VI. FEATURES OF THE PROPOSED OPTIONAL PROTOCOL: RIGHTS SUBJECT TO COMPLAINTS, STANDING TO COMPLAIN, AND FOLLOW-UP PROCEDURES

22. On the morning of the second day, principal aspects of the complaints procedure as contained in the draft optional protocol were discussed. Mr. Eibe Riedel, professor at the University of Mannheim, Germany, and member of the United Nations Committee on Economic, Social and Cultural Rights, spoke of the procedure's scope ratione materiae, i.e. the rights in the Covenant that would be subject to the complaints procedure. The Committee, according to Mr. Riedel, supported the position that a comprehensive approach should be adopted, whereby all Covenant rights (arts. 1-15) could be the subject of complaints before the Committee in the framework of an optional protocol, in contrast to the so-called "à la carte" approach, which would allow for a selection of rights. He expounded on the typology of State obligations (the obligations to respect, to protect and to fulfil), to demonstrate that all Covenant rights contained components that could be subjected to an individual or group complaints procedure, and thus were justiciable. He particularly focused on the three most recent general comments of the Committee (on the right to food, the right to education and the right to health), in which the Committee outlined the scope of State obligations with regard to these rights on the basis of the typology of obligations. These normative interpretations of Covenant rights would therefore be especially useful in a complaints procedure. Finally, in addition to being in favour of a complaints procedure for the ICESCR, he expressed support for the inclusion of an inquiry procedure (as included in the optional protocol to the CEDAW) and an urgent action procedure.

23. The discussion that followed brought to light strong positions of certain participants supporting the comprehensive approach advocated by the Committee, calling to mind the principle of interdependence and indivisibility of all human rights, although there was also some support for the so called "à la carte" found in the context of the European Social Charter. Furthermore, the point was raised that it seemed unreasonable to demand clarification of the normative contents of the Covenant rights a priori for the possible acceptance of an optional protocol to the ICESCR, whereas it was left to the discretion of existing international and national bodies of adjudication to determine and develop the normative scope of rights. The adoption of a complaints procedure would assist the Committee in furthering its ongoing work of normative interpretation of Covenant rights in the context of the reporting procedure and in the general comments, by allowing it to look at individual cases.

24. Mr. Michael Windführ, Executive Director of FoodFirst Information and Action Network - FIAN, gave a presentation on the beneficiaries of the right to submit a complaint. Mr. Windführ noted that Governments were often unaware of the obligations they had undertaken. The same was true of international institutions, which often were not aware of the content and requirements of the rights relating directly to their work. As a result, FIAN had become convinced of the importance of developing international jurisprudence on economic, social and cultural rights, including for the right to food. According to the speaker, the draft under discussion allowed only complaints about violations as such, but not about the lesser

standard of "unsatisfactory fulfilment". This was claimed to be a necessary limitation owing to the nature and requirements of "progressive realization". He added that domestic remedies must also be exhausted, and that this too should be seen as a necessary limitation. In spite of these limitations, Mr. Windführ believed that the draft did provide for broad access. The text allowed both individuals and groups to complain. The inclusion of individuals was evident, he noted, but group complaints were especially important for certain group-based societies, like indigenous peoples. Thus, the reality of collective denial called for the option of collective complaint to be available. He added that the draft also allowed third parties to complain, so long as they had sufficient interest and were "acting on behalf" - that is, with a mandate from the victims.

25. The speaker proceeded to explain that the Committee had defined the content and obligations of the right to food in General Comment No. 12, focusing on direct access to food and access to a resource base allowing people to obtain food in dignity. Violations were also defined, including breaches of the obligation to respect, to protect and to fulfil. Each of those elements would be relevant to complaints under the protocol. In concluding, Mr. Windführ pointed out that international factors such as structural adjustment programmes, trade regimes and World Trade Organization rules, and others, were also of import to the realization - or violation - of those rights. International obligations, which were covered in the Covenant, raised questions both of the duty of international support and aid (positive obligations) and avoidance of interference, like unfair fishing and trade policies and practices (negative obligations). Finally, while the obligations were those of the States parties, they included positive obligations to act to protect the rights also vis-à-vis third parties, like private enterprise.

26. In the plenary discussion that followed, one government representative put forward the example of the Cotonou agreement between the European Union and the African, Caribbean and Pacific (ACP) partner States, which he saw as containing a good "soft principle", by which EU activities that negatively affected a country were to be followed up and discussed. He believed that there must be a mechanism - not punitive, but providing for dialogue - to allow the international dimension to be expressly covered under the optional protocol. Another representative asked for clarification on the application of the optional protocol in federal States, in case deep cultural and religious differences and the considerable autonomy given to various regions prevented the federal Government from effectively enforcing Covenant obligations. The representative, noting that the African Charter included group obligations and individual obligations, while the draft optional protocol dealt only with rights, asked how the optional protocol could address violations committed by others than the State, such as families and other social groupings.

27. Still another representative wondered how the kinds of structural problems that were likely to be at the base of "fulfilment"-type violations could be addressed adequately. He also wondered how the protocol could have any effect in an emergency situation, given the time it took for international mechanisms like the Committee to respond to communications. The panel was asked for clarification on how causation could be determined in violations of economic, social and cultural rights, and how responsibility could be apportioned between national Government breaches of their Covenant obligations to respect, protect and fulfil the rights on the one hand, and international cooperation responsibilities on the other. In responding to the questions raised by delegates, Mr. Windführ underscored that the draft optional protocol would create no new substantive obligations, as these were already contained in the Covenant itself.

As for difficult causation questions, those could be explored on a case-by-case basis, as many NGOs had done many times, even exploring the international causal links. The optional protocol would allow these to be explored and addressed in a careful and transparent way. The proposal to list the groups eligible to complain presented no problem in principle, but the use of the general term "groups" allowed any relevant group to be included.

28. In a presentation on follow-up procedures, Ms. Kitty Arambulo, of the secretariat of the Committee on Economic, Social and Cultural Rights at OHCHR, began by noting that the optional protocol should not be expected to cover all the challenges raised during the debate, which touched upon a broad range of the legal, economic and technical aspects of national experiences. It could, however, provide enhanced legality, uniformity, justice and stability to balance the volatile economic and political forces at play at the international level. While reminding participants that the focus of the draft and the present discussion were on the relationship between the individual and the State, it was recognized that the debate had shown that there might be outstanding questions concerning an inter-State complaints procedure, that would address the relationship between States.

29. With regard to the question of follow-up options for the Committee under a complaints procedure, Ms. Arambulo addressed the possibility of measures to remedy violations and to prevent recurrence. Those options were derived from existing powers and procedures of international human rights mechanisms such as the Human Rights Committee, the Committee against Torture (CAT) and the Committee on the Elimination of Racial Discrimination (CERD). They might not be binding in a legal sense, but they did have moral authority and actual influence on State action. What was more, the doctrine of implied powers demanded that if the committees could review, they could certainly recommend remedial action. The treaty bodies themselves, meeting at Vienna during the World Conference, recognized that effective follow-up was a sine qua non for effective treaty operation. The draft did not empower the Committee to order compensation or reparations, but was intentionally more advisory and general in nature. Still, from the perspective of the complainant, follow-up was the most important part of the process. Indeed, the State itself was a beneficiary, as identifying meaningful follow-up allowed the State an opportunity to remedy an existing problem in law, policy or structures. In sum, the inclusion of follow-up procedures in the draft optional protocol was both crucial and of practical utility.

30. In the plenary discussion that followed, participants noted that the presentation had demonstrated that the follow-up procedures were both directed to providing relief to the victims and, importantly, to encouraging structural changes in the countries reviewed. Thus, the petitions had a significance that went beyond the individual case and victim. Others were struck by the importance of the comments of several panellists who pointed to the lack of binding force of the decisions of the Committee. With that in mind, it was all the more important to insist that national law incorporate the international standards and the requirements of follow-up. A representative also raised the question of how the interaction between the Committee, as well as the other treaty bodies, and States parties could be improved.

31. Experts agreed with those who emphasized the importance of incorporating the Covenant obligations in national law. The draft optional protocol would contribute to that process, would serve as a vehicle for specific policy recommendations, and could thus provide a catalyst for

structural change, over a period of time. As for concerns expressed about interaction between the Committee and States, that could be enhanced by more targeted questions and answers on both sides. Between sessions, States might need assistance, including from OHCHR, and such advice was available. In the meantime, guidance was available in the form of the reports, the general comments, the days of general discussion, and the ad hoc statements of the Committee. As for inter-State mechanisms, while those were seldom used, most saw no reason to object to the inclusion of such provisions if it would help move the process of adoption of the optional protocol forward. It was not wise to complicate the discussion and process with the burdens of the right to development debate, noted some.

32. With regard to obligations of federal States, it was the federal (national) Government that was responsible under international law. By becoming party to a treaty, the State became obliged to give it effect throughout its territory. All federal States had developed mechanisms to do that. As for the inclusion of an inter-State complaints mechanism, they had not worked in practice because States had not opted to use them. As for the question of international cooperation raised by some delegations, that was one small but important aspect of the Covenant which had the attention of the Committee. The third-level obligation to fulfil implied no hierarchy or division of obligations on a right-by-right basis. The categories of respect, protect and fulfil were merely tools for understanding obligations. For purposes of justiciability, all of those categories were equally relevant. With regard to the issues of globalization, liberalization and trade regimes, State actions had fiscal implications in other countries such that international norms and mechanisms (like the optional protocol) were especially important safeguards in a globalizing world. The Committee had already cited retrogressive measures as per se violations, and it could not be ignored that some of those measures were actually sometimes encouraged by the forces of globalization, by trade rules, and by some free market proponents. In that sense, the Committee must recognize its competence to raise issues of retrogression, and Governments should raise legitimate issues of external pressures in defence.

33. The representative of the International Federation Terre des Hommes spoke on behalf of a coalition of 26 NGOs supporting the adoption of the optional protocol. The representative declared that global civil society was mobilizing to defend economic, social and cultural rights as rights. Civil society throughout the world was confronting the hard issues of advancing those rights in the context of poverty, and in the face of gross violations of interrelated civil and political rights. The challenge now for NGOs, she maintained, was to advocate for recognition of the justiciability of economic, social and cultural rights at the national level. But she reminded participants that NGO defence of human rights on the ground must go hand-in-hand with legal developments, both nationally and internationally. The NGOs support the protocol, and view it to be in the interest both of States and NGOs. Such mechanisms could serve as valuable tools for preventing violence by providing a channel for redress. She warned that the protocol must not be used as a means of settling the North-South divide, but rather, States should support this modest step and establish a working group of the Commission on Human Rights to work on the draft and amend it as required. Concluding, she appealed for the final instrument to be as progressive as possible, but most importantly, it should be adopted without delay. A government representative expressed the view that the appropriate parties to be granted standing to submit complaints were individuals and groups alleging violations. While there might be

arguments for allowing third parties to complain, it was important to reasonably limit the range of potential complainants. As for inter-State complaints mechanism, the representative shared the scepticism expressed by a number of participants.

34. Experts emphasized that clarity within the debate should be retained in distinguishing between inter-State mechanisms and the individual complaints mechanisms, as well as between the real or perceived obstacles to both. Inter-State mechanisms indeed were heretofore unused at the United Nations level and underused at the European level, precisely because they were viewed as sensitive to political abuse. They could, however, be appropriate procedures for addressing the important international dimensions - such as international cooperation and the responsibility of other States - in the context of a quasi-judicial procedure of the United Nations human rights system. The Universal Declaration of Human Rights was not premised on an antecedent proof of justiciability. Rights by their very nature carried obligations and were subject to enforcement. In the final analysis, it was assessed, the positives outweighed the negatives, if one was committed to greater international equality and better national conditions.

35. Ms. Virginia Bonoan-Dandan, Chairperson of the Committee on Economic, Social and Cultural Rights, observed that, as evidenced by the presence and participation of so many States, the notion that there was no interest in the optional protocol could certainly be put to rest. Underscoring the importance of the workshop, she recalled that the Vienna Declaration and Programme of Action called on the Committee on Economic, Social and Cultural Rights to draft the optional protocol, that the Committee had done its work, but that no progress had been seen since then. Responding to a statement from a government delegation, Ms. Bonoan-Dandan noted that if there was a question about the competence of the Committee to do its work under the protocol, it was the responsibility of the States parties that nominated the members to ensure the level of quality they wished to see in the Committee's work. In the end, the protocol would be, by definition, optional. No State would be forced to ratify it, but, in the view of the speaker, it was wholly inappropriate for any State to block other States from adopting the protocol, thereby creating the possibility of choosing ratification.

36. Mr. Miloon Kothari, United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living of the Commission on Human Rights, believed that the optional protocol would clearly facilitate the work of NGOs and agencies working on economic and social rights, especially in the present age of globalization. This, in his view, would be precisely the value of casework and jurisprudence developed under the protocol. As for international cooperation and related obligations, this was an underused and important element of the Covenant, including for its "solidarity aspects". States must point to their Covenant obligations if pressured to enter into trade or other obligations that might undercut the rights contained in the Covenant. Still, one must not lose sight of national-level obligations of the State and the primary need to move forward on realization at the national level. Finally, referring to recently issued detailed general comments on health, education and food, he concluded that an optional protocol could be used to test these comments and continuously advance knowledge, understanding and realization of the related rights.

VII. CONCLUSIONS, RECOMMENDATIONS, AND OPTIONS REGARDING PROGRESS TOWARDS THE ADOPTION OF THE PROTOCOL

37. In a final session, co-chaired by Ms. Deepika Udagama, member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, and Mr. Theo van Boven, Vice-President of the ICJ, the latter noted that the draft protocol was pending before the Commission on Human Rights since 1997. He recalled that, in the High Commissioner's report, three options for action were provided: (a) to request more information from States (which did not exclude the other options); (b) to establish a working group of the Commission on Human Rights (which would probably be inter-sessional); or (c) to move to immediate discussion and adoption of the protocol by the Commission. He added that other options might theoretically be feasible, such as referring the matter to the Sub-Commission, referring the draft back to the Committee for review, or appointing an individual expert to review the text and report back to the Commission. Based on the results of the workshop so far, however, he believed that the Commission working group option would be the best course. That was especially so owing to the need to involve Governments more in the process at the present juncture. What was more, the recent precedent of the optional protocol to the CEDAW provided some encouragement. The ultimate aim, he concluded, was the early adoption of the protocol. Ms. Udagama recalled that the Sub-Commission had officially and explicitly supported the optional protocol (in its resolution 2000/9), and had in fact called on the Commission to establish an open-ended working group. She believed that the Sub-Commission had neither the resources nor the time to undertake the work, which at present was more appropriately the task of the Commission.

38. One delegate expressed concern that Commission working groups could last a very long time without making progress, and that the time might not yet be ripe to submit the present draft to such a process. Another delegate recalled that under the exercise concerning the optional protocol for the Committee on the Elimination of Discrimination against Women, justiciability soon fell away as an issue, in part owing to the understanding reached on issues of standing and of the powers of the Committee. However, that Convention dealt only with discrimination cases, whereas the present protocol would have to address economic and social policy areas, including issues of the allocation of resources. How would the Committee review government decisions about conflicting interests, conflicting rights, conflicting obligations and conflicting claims?

39. It was noted that the remaining questions were now mostly political, i.e. policy questions for Governments. As such, an open-ended working group of the Commission on Human Rights was the appropriate forum to deal with those issues. It was believed that the Committee and the Sub-Commission might indeed have a role as suggested, as experts to which the working group could refer specific questions as it deemed necessary. It was declared to be self-evident that the Committee on Economic, Social and Cultural Rights should have the same powers and mechanisms afforded to the Human Rights Committee under the ICCPR. One delegation maintained that it was premature to move to a working group of the Commission at the present time, but future seminars to consider further the issues in that format would be appropriate. Still another believed that many questions had been raised, including those of conflicting obligations and standing to complain. One delegate proposed sending the draft back to the Committee on Economic, Social and Cultural Rights, followed by the submission of a new draft to the Commission later.

40. It was noted that, in the case of the protocol to the CEDAW, the draft was prepared by the States parties in an in-session working group, not by the Committee on the Elimination of Discrimination against Women (CEDAW). One CEDAW member was called upon as an occasional resource person to answer the questions of State delegations in the working group. It was also explained that the Committee on Economic, Social and Cultural Rights regularly dealt with questions of conflicting obligations in the context of the reporting procedure. This was a normal part of the Committee's work, and should not be seen as a barrier to the adoption of the optional protocol.

41. Mr. Scheinin, as Rapporteur, summed up and provided some final comments. In his view, the workshop clearly demonstrated the high relevance of the proposal for an optional protocol to the ICESCR. The high level of government representation and participation in the workshop was a marker of its success. The optional protocol, by definition, could not be imposed on any State. Nor would it impose any new substantive obligations, as those were contained in the Covenant itself. In that regard, the recent establishment of a specialized petitions team in OHCHR was an important step towards improving the effectiveness of the United Nations complaints system. There was a recognized need to collect and compile relevant national case law to facilitate the work of the optional protocol, as well as to support national judges in the adjudication of economic, social and cultural rights, he noted. He recalled as well how the workshop had reviewed both international and national experiences and practices, including many cases of the justiciability of economic, social and cultural rights at the national level, and the handling of relevant complaints in international mechanisms.

42. The Rapporteur also noted the workshop's consideration of the adoption of the protocol to the CEDAW as an important development given that, in spite of the inclusion of economic, social and cultural rights in that Convention, the optional protocol was adopted and entered rapidly into force. Also, a preference was observed during the course of the workshop for a scope ratione materiae, which is all-inclusive, as well as for standing to be granted to both individuals and groups, similar to the optional protocol to the CEDAW. The poor and marginalized should be the prime beneficiaries, and procedures should be designed to accommodate them. Reservations should not be allowed, since they would amount to post facto reservations to the Covenant itself. The principal remaining obstacle to the adoption of the protocol was political resistance. The Commission on Human Rights needed to make an informed decision about the way forward and, in order to facilitate that, Governments should submit their written comments on the protocol to the next session of the Commission.

43. The question of inter-State complaints was to be seen as a separate issue and, it was believed, the need now was to remain focused on the individual complaints procedure contained in the draft. There was wide support for the draft being designed to respond to violations of the rights of individuals and groups, rather than to a lesser standard of unsatisfactory application. Also recognized was a need for strong follow-up procedures, to ensure that remedial action followed consideration. As such, Committee decisions under the protocol should include a legal finding, as well as recommendations for remedial action and changes in law, policy and practice. Finally, most participants in the workshop agreed that the most suitable next step was for the Commission on Human Rights to establish an open-ended working group at its next session to work towards the adoption of the optional protocol.

44. In the official closing statement to the workshop, Ambassador Huhnatiemi characterized the workshop discussions as excellent and the event itself as a useful contribution. Key issues had been clarified and, importantly, practitioners themselves had demonstrated that economic, social and cultural rights were not only justiciable in theory, but adjudicated in fact, internationally and in countries around the world. The optional protocol, he observed, was to be a safety net, a measure of last resort and a tool for identifying areas where States needed practical assistance. Important momentum had been created by the workshop, and it was now for the Commission on Human Rights to decide the next step.

ANNEX

LIST OF PARTICIPANTS

Invited experts

Mr. Jean-François Akandji-Kombé	Professor, University of Caen Basse-Normandie, France
Mr. Philip Alston	Professor, European University Institute, Florence, Italy
Ms. Virginia Bonoan-Dandan	Chairperson, Committee on Economic, Social and Cultural Rights
Ms. Jane Connors	Chief, Women's Unit, United Nations Division for the Advancement of Women (DAW)
Mr. Vojin Dimitrijevic	Director, Belgrade Centre for Human Rights, Yugoslavia
Mr. Alberto León Gómez-Zuluaga	Advocate, former assistant director of the economic, social and cultural rights programme of the Colombian Commission of Jurists, Colombia
Mr. Pekka Huhtaniemi	Permanent Representative of Finland to the United Nations Office at Geneva
Ms. Jainaba Johm	Member of the African Commission on Human and Peoples' Rights
Mr. Miloon Kothari	United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living
Ms. Viviana Krsticevic	Executive Director, Center for Justice and International Law, United States of America
Ms. Sandra Liebenberg	Associate Professor, acting director of the Community Law Centre, University of the Western Cape, South Africa
Mr. Alvaro Mendonça e Moura	Permanent Representative of Portugal to the United Nations Office at Geneva
Mr. Ariranga Pillay	Chief Justice, Supreme Court of Mauritius and member, United Nations Committee on Economic, Social and Cultural Rights
Mr. Bruce Porter	Coordinator, the Charter Committee on Poverty Issues, Canada
Mr. Eibe Riedel	Professor, University of Mannhein, Germany, and member of the United Nations Committee on Economic, Social and Cultural Rights
Mr. Martin Scheinin	Professor for Human Rights, Åbo Akademi University (Finland), member of the United Nations Human Rights Committee
Mr. Philippe Texier	Judge at the Cour de cassation, France, and member of the United Nations Committee on Economic, Social and Cultural Rights
Ms. Deepika Udagama	Member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights

Mr. Rajagopalan Venkataramani	Senior advocate at the Supreme Court of India
Mr. Michael Windführ	Executive Director of FoodFirst Information and Action Network - FIAN

States

Albania	Mr. Genti Bendo
Algeria	Mr. Chems-Eddine Zelasi
Australia	Ms. Jennifer Meehan
Austria	Ms. Gabriela Kühtreiber
Azerbaijan	Mr. Tofig Musayev
Belarus	Mr. Sergei Anoshko
Belgium	Mr. Léopold Merckx
Belize	Ms. Alicia Hunt
Bosnia and Herzegovina	Ms. Sanela Avdic
Brazil	Mr. Alexandre Peña Ghisleni
Canada	Ms. Deborah Chatsis
Chile	Mr. Pedro Oyarce
China	Mr. Tian Lixiao
Côte d'Ivoire	Ms. Gisèle Kete
Croatia	Ms. Vesna Kos
Cyprus	Ms. Frances-Galatia Williams
Ecuador	Mr. José Valencia
Egypt	Mr. Ibrahim Salama
Eritrea	Mr. Bereket Woldejohannes
Estonia	Ms. Merike Kokajev
Ethiopia	Mr. Seleshi Mengesha,
Finland	Mr. Pekka Huhtaniemi
	Ms. Anneli Vuorinen
	Mr. Erik af Hällström
France	Ms. Emmanuel Pitron
	Mr. Jean-Philippe Charlemagne
Germany	Mr. Walter Lewalter
	Mr. Robert Dieter
Guatemala	Mr. Carlos Arroyave Prera
Holy See	Ms. Anne-Marie Colandrea
Hungary	Mr. István Lakatos
Iceland	Ms. Ingibjorg Davidsdottir
India	Mr. Sharat Sabharwal
Ireland	Mr. Kevin Dowling
Israel	Mr. Yaakov Levy
	Ms. Teizu Guluma
Italy	Mr. Giuseppe Calvetta
Japan	Ms. Naoko Maeda
Kenya	Ms. Juliet Gicheru
Lebanon	Mr. Johnny Ibrahim
Madagascar	Mr. Maxime Zafera
	Ms. Clarah Andrianjaka

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Malta	Mr. Michael Bartolo
	Ms. Annabelle Mifsud
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Morocco	Ms. Jalila Houmane
Myanmar	Daw Aye Aye Mu
Nepal	Mr. Nabin Bahadur Shrestha
Netherlands	Mr. Henk Cor van der Kwast
Nigeria	Mr. Kutia Vincent Ateb
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Norway	Ms. Ingrid Mollestad Sylow
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	Mr. Alvaro Mendonça e Moura
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Slovenia	Mr. Gregor Zore
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United Nations Research Institute for Social Development	Mr. Thomas Ansorg
United Nations Educational, Scientific and Cultural Organization	Ms. Annar Cassam
World Health Organization	Ms. Helena Nygren-Krug
World Bank	Mr. Alfredo Sfeir-Younis
	Ms. Marta Molares Halberg

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Centre on Housing Rights and Evictions (COHRE)	Mr. Scott Leckie
Contextos Latinoamericanos	Mr. Carlos Roberto Saenz Vargas
Europe-Third World Centre	Mr. Malik Ozden
Friends World Committee for Consultation (Quakers)	Ms. Rachel Brett
International Confederation of Free Trade Unions (ICFTU)	Ms. Marie-Thérèse Bellamy
International Council on Social Welfare (ICSW)	Mr. Héctor Mareque
International Federation of Human Rights Leagues	Ms. Elena Petroula
International Federation Terre des Hommes	Mr. Jean Regis Renard
	Mr. Jean Cattier
	Ms. Maribel Wolfe
Lutheran World Federation	Mr. Peter Prove
Pax Romana	Ms. Jessica Mongé
	Mr. Alex Bongani Mthobi
3 D Associates	Ms. Caroline Dommen
World Organization against Torture	Ms. Nathalie Mivelaz
Worldview International Foundation	Ngawang Choephez

Other organizations

Fiji Human Rights Commission	Ms. Vuki Qionibaravi
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International Committee of the Red Cross (ICRC)	Ms. Jelena Pejic

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Mr. Craig Mokhiber	Secretary of the Workshop and Coordinator, Development Team (RRDB)s
Mr. Alexander Tikhonov	Secretary, Committee on Economic, Social and Cultural Rights, Support Services Branch (SSB)
Ms. Kitty Arambulo	Human Rights Officer, secretariat, Committee on Economic, Social and Cultural Rights (SSB)

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